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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

In re the Matter of:

MARTHA RODRIGUEZ, a single
woman,

Plaintiff,

vs.

QUALITY LOAN SERVICE CORP. a
California corporation licensed to do
business in the State of Arizona,
MIDFIRST BANK a nationally chartered
bank, and their subsidiary **MIDLAND**
MORTGAGE COMPANY, an Oklahoma
Corporation licensed to do business in the
State of Arizona, **WELLS FARGO**
BANK, N.A., a national banking
association licensed to do business in the
State of Arizona. **TRES AMIGOS**
PROPERTIES LLC, an Arizona limited
liability company, **XYZ**
CORPORATIONS 1-10, JOHN and
JANE DOES 1-10, BLACK
PARTNERSHIPS 1-10

Defendants.

Case No. CV-09-01853-PHX-FJM

**PLAINTIFF'S RESPONSE TO
DEFENDANTS MIDFIRST BANK
AND MIDLAND MORTGAGE
COMPANY'S MOTION TO
DISMISS OR, IN THE
ALTERNATIVE, MOTION FOR
SUMMARY JUDGMENT RE
COUNT I**

(Assigned to the Honorable
Frederick J. Martone)

**(ORAL ARGUMENT
REQUESTED)**

Comes now the Plaintiff, Martha Rodriguez, by and through counsel undersigned, and respectfully requests the court to deny Defendants MidFirst Bank and Midland Mortgage Company's Motion for Summary Judgment on the grounds

1 that there are material facts in dispute, and the case is not yet ripe for dispositive
2 motions.

3 This Response is based upon the following Memorandum of Points and
4 Authorities and attached Statement of Facts.

5 **RESPECTFULLY SUBMITTED** this 30th day of July, 2010.

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8 **JOSEPH W. CHARLES, P.C.**

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10 By: /s/ Joseph Charles
11 **JOSEPH W. CHARLES**
12 Attorney for Plaintiff

13 **MEMORANDUM OF POINTS AND AUTHORITIES**

14
15 **1. Introduction**

16 This Motion comes before this Court as a follow up to a Motion that has
17 already been rules upon. On April 13th, 2010, this Court granted the Movants'
18 Motion as to all Counts except Count I. The order stated in relevant part, "At this
19 stage of the proceedings, it is unclear as to who was the beneficiary and holder
20 of the note under the deed of trust at the time of the trustee's sale. This issue can
21 be clarified through discovery." Now the Movants' are reasserting their position with
22 the added declaration of an employee. However, the Court did not reject the
23 original Motion because it lacked the declaration that is now included, but rather the
24 Court denied this portion of the Motion because Plaintiff was ill prepared to properly
25 defend her position.
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1 Plaintiff disagrees with the Movants' third paragraph in their statement of
2 facts. (Plaintiff's Statement of Facts ¶ 3). The declaration in support of paragraph 3
3 appears to be testimony as to a pattern or practice of the company rather than
4 personal knowledge based on physical observations. If the Note in question has
5 been found and indentified, Movants' need only demonstrate their possession of the
6 Note to be dismissed by Plaintiff.
7

8 Plaintiff requires additional time and discovery before an order granting this
9 Motion is appropriate. Plaintiff has filed or will file a motion to produce the Note in
10 question. Plaintiff is also in discussions with Wells Fargo for the depositions that
11 are necessary. Plaintiff needs the time afforded by Federal Rules of Civil Procedure
12 56(f) in order to mount a proper argument.
13
14

15 **2. Argument.**

16 **A. Summary judgment standard.**

17 Arizona law requires that two (2) prerequisites be met before a Motion for Summary
18 Judgment may be granted. First, the entire record must reveal that no genuine
19 dispute exists as to any material fact and that only one (1) inference can be drawn
20 from the undisputed material facts; and second, based upon the undisputed material
21 facts, the moving party is entitled to judgment as a matter of law. Rule 56(c), Ariz. R.
22 Civ. P.; Orme School v. Reeves, 166 Ariz. 31, 802 P.2d 1000 (1990); Nicoletti v.
23 Westcor, Inc., 131 Ariz. 140, 639 P.2d 330 (1982).
24
25

26 **B. There are material facts in dispute.**

27 Plaintiff believes that Movants are not the true holders of the Note. Movants
28 have not, as of this date, made the Note available for inspection. Movant's

1 employee has not testified that he visually verified the ownership of the note. As
2 such, Summary judgment is inappropriate.

3
4 **C. The motion is not yet ripe to rule upon because Plaintiff has not received**
5 **discovery from Wells Fargo.**
6

7 Plaintiff has now received the disclosure from Wells Fargo and Movants, but
8 discovery is ongoing. The Federal Rules of Civil Procedure state, “[t]he judgment
9 sought should be rendered if the pleadings, **the discovery and disclosure**
10 **materials on file**, and any affidavits show that there is no genuine issue as to any
11 material fact and that the movant is entitled to judgment as a matter of law.” Fed. R.
12 Civ. Proc. 56(c)2 (emphasis added). The Supreme Court of the United States has
13 stated that “[i]n our view, the plain language of Rule 56(c) mandates the entry of
14 summary judgment, **after adequate time for discovery** and upon motion, against a
15 party who fails to make a showing sufficient to establish the existence of an element
16 essential to that party's case, and on which that party will bear the burden of proof at
17 trial.” Celotex Corp. v. Catrett, 477 U.S. 317, 322 (U.S. 1986) (emphasis added).
18
19

20 **D. Statutory Trustee's Sale provisions.**

21 Movants cite the statutory rules and case law pertaining to Trustee's Sales.
22 Plaintiff does not dispute the statute or the opinions, but Movants misread both.
23 The case cited certainly does stand for the rule that presentation of the note is not
24 required before conducting a Trustee's Sale, but this is not a case about preventing
25 an impending sale. This is a case that seeks damages from a sale that has already
26 happened. Likewise the statutes Movant cites are appropriate, but the Movants
27 redirect the Court's attention away from the most important language. The statute
28

1 says, "A trustee's deed shall constitute conclusive evidence of the meeting of those
2 requirements in favor of purchasers or encumbrancers for value and without actual
3 notice." A.R.S. ¶ 33-811(B) (emphasis added). This language makes it clear that
4 the point of the statute was to protect bona fide purchasers, not parties who
5 conducted the sale wrongfully.

6
7 **3. Conclusion.**

8 Summary judgment is inappropriate at this early stage because the parties
9 dispute whether Movants actually holds the Note. Furthermore, Plaintiff has not
10 concluded discovery. The Federal Rules of Civil Procedure and the cases that
11 analyze them make it clear that dispositive motions are favored after a reasonable
12 time for discovery.

13
14 **DATED** this 30th Day of July, 2010.

15
16 **JOSEPH W. CHARLES, P.C.**

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18 By: /s/ Joseph W. Charles
19 **JOSEPH W. CHARLES**
20 *Attorneys for Plaintiff*
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1 ORIGINAL filed this 30th day of
2 July, 2010, with:

3 Clerk of the Court

4
5 COPY of the foregoing mailed this 30th
6 day of July 2010, to:

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